Hastings Law Journal

Volume 33 | Issue 3 Article 4

1-1982

Source Disclosure in Public Figure Defamation Actions: Towards Greater First Amendment Protection

Paul L. Glenchur

Comments

Source Disclosure in Public Figure Defamation Actions: Towards Greater First Amendment Protection

The news media's use of confidential sources to uncover information during the Watergate scandal demonstrated the importance of unidentified informants to the reporting process.[1] Although most confidential reporter-source relationships occur in less dramatic settings, the existence of such relationships often provides the best means of obtaining reliable information. A secret informant, frequently one of the most valuable sources of information for an investigative journalist, may require anonymity before revealing information to a journalist because revelation of the informant's identity may lead to adverse consequences to the source, including harassment and possible loss of employment. The value and vulnerability of covert informants underscores the importance of providing judicial protection of their identities against unwarranted disclosure.

Attempts to force disclosure of confidential news sources during criminal proceedings have been widely publicized.[2] The Supreme Court has ruled that a reporter does not have an absolute testimonial privilege to refuse to disclose confidential sources when disclosure

1. For a discussion of the use of informants during the Washington Post's investigation of the Watergate scandal, see T. CROUSE, THE BOYS ON THE BUS 290-97 (1973); D. HALBERSTAM, THE POWERS THAT BE 648-50 (1979); B. WOODWARD & C. BERNSTEIN, ALL THE PRESIDENT'S MEN (1974).

2. In 1978, *New York Times* reporter Myron Farber was subpoenaed by the defense to produce documents in the murder trial of a medical doctor. Although the New Jersey shield law provided protection for a reporter's sources of information, the New Jersey Supreme Court ordered disclosure, holding that the criminal defendant's right to compulsory process under the sixth amendment prevailed over the New Jersey shield law. *See In re* Farber, 78 N.J. 259, 394 A.2d 330, *cert. denied*, 439 U.S. 997 (1978). In Farr v. Superior Court, 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (1971), *cert. denied*, 409 U.S. 1011 (1972), reporter William Farr, covering the murder trial of Charles Manson, obtained copies of a statement by a prospective witness. Attempting to limit trial publicity, the court issued an order prohibiting attorneys or witnesses from disclosing to the press the contents of any evidence. The court ordered Farr to disclose the source of his information, rejecting Farr's contentions that California's shield law and the first amendment protected him from forced disclosure of his source.

would be relevant to a grand jury investigation.[3] A different conflict has arisen in civil trials, however, particularly in defamation actions in which a journalist might refuse to name the source of an allegedly false and defamatory statement. This conflict may pose a serious problem in public figure defamation suits because to prevail under *New York Times Co. v. Sullivan*,[4] a public official or, as expanded in a subsequent case, a public figure,[5] must prove that a media defendant published the defamatory statement with knowledge of its falsity or with a reckless disregard for the truth or falsity of the statement.[6] Defined as "actual malice," this scienter requirement is designed to prevent the threat of excessive libel judgments from inhibiting free discussion of public issues by the press.[7]

The conflict between a plaintiff's need for evidence to prove actual malice and a journalist's commitment to withhold the identity of a confidential source has emerged partly as a consequence of the landmark *New York Times* decision. The heavy evidentiary burden of the *New York Times* actual malice requirement has increased the need for a public figure plaintiff to obtain all sources of evidence. When a reporter claims that he or she acted without recklessness because a confidential source was reliable, the reliability of that source is an issue at trial. The plaintiff will normally attempt to force disclosure of the source's identity, because "recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."[8] Compelled disclosure of an informant's identity, however, threatens to inhibit the willingness of a source to pass information to reporters, a restriction on the press that clashes with the Supreme Court's commitment to uninhibited debate on public issues.[9]

---

3. Branzburg v. Hayes, 408 U.S. 665 (1972).

4. 376 U.S. 254 (1964).

5. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). The term "public figure" will be used throughout this Comment to refer to both public officials and figures. See notes 13-14 & accompanying text *infra*.

6. 376 U.S. at 279-80. The scope of this Comment is limited to source disclosure cases in public figure defamation actions. Private individual plaintiffs are not required to prove that a media defendant published with knowing or reckless falsity to prove liability in a defamation action. Rather, a state may define for itself the appropriate standard of liability for an action brought against a media defendant by a private individual, so long as a state does not impose liability without fault. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). Hence, it is less likely that the identity of a source will be necessary to a private individual's cause of action for defamation against a media defendant.

7. 376 U.S. at 277-79.

8. St. Amant v. Thompson, 390 U.S. 727, 732 (1968) (footnotes omitted).

9. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). A related problem respecting disclosure is that a public figure plaintiff may file a defamation suit solely to discover a source's identity to seek revenge against the source. *See* 23 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE 792 (1980) [hereinafter cited as WRIGHT & GRAHAM]; Kovner, *Disturbing Trends in the Law of Defamation: A Publishing Attorney's*

Recent federal and state court decisions have left unclear what standards, if any, courts should use when striking the balance between a defamation plaintiff's need for evidence to prove the *New York Times* standard and the interests in protecting the identities of confidential sources of information. This Comment focuses on attempts to compel disclosure of confidential sources in public figure defamation actions. Following an analysis of the relevant constitutional interests, newsgathering, freedom of expression, and free speech rights of the source, the Comment traces the judicial evolution of a journalist's testimonial privilege in defamation cases. In recognition of the chilling effect of compelled disclosure on the exercise of first amendment freedoms, the Comment concludes by recommending that the standards be modified to afford greater first amendment protection to confidential news sources whose identities are sought in public figure defamation suits. First, a plaintiff should be required to provide substantial evidence of actual injury or harm before disclosure is compelled; and second, a plaintiff should be required to show substantial evidence of success on the merits for those issues capable of proof without disclosure of confidential sources.

New York Times Co. v. Sullivan

In *New York Times Co. v. Sullivan*,[10] the Commissioner of Public Affairs for Montgomery, Alabama brought a libel action against the New York Times for publishing a paid advertisement criticizing the conduct of the Montgomery police during a demonstration. The trial court entered a $500,000 judgment against the Times and several co-defendants, and the Alabama Supreme Court affirmed. A unanimous Supreme Court reversed the judgment, holding that the first amendment affords the press limited protection to publish an otherwise defamatory statement about a public official if the statement was published without "actual malice," that is, without "knowledge that it was false" or without "reckless disregard of whether it was false or not."[11] Although the Court found that the advertisement's libelous statement might have been negligently published,[12] the Court denied

Opinion, 3 HASTINGS CONST. L.Q. 363, 370 (1976): "In recent years, however, some publishers have been confronted with the defamation suit designed to force disclosure of confidential sources. Such a suit is often brought by a public official or other person who feels damaged by leaks, or 'not-for-attribution' statements made by persons with knowledge of the facts. Their objective is often neither damages nor vindication, for the underlying material may well be substantially true, but rather disclosure and punishment of the confidential source who may have performed a substantial public service at risk to his employment or career."

10. 376 U.S. 254 (1964).

11. *Id.* at 279-80.

12. *Id.* at 288.

recovery because the evidence failed to establish that the statements were published with actual malice.

The *New York Times* decision affirmed the Court's recognition of the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open,"[13] and articulated the actual malice standard to protect the press from liability for good faith reporting of public affairs.[14] Underlying the Court's decision to impose this first amendment limitation on libel laws was the recognition that strict liability for false and defamatory statements concerning public figures could lead to self-censorship of truthful information by a press fearing the risk of large damages awards.[15]

Hence, under *New York Times*, to succeed in a defamation action, a public official or public figure must prove that a media defendant published an otherwise defamatory statement about the plaintiff with a knowledge of its falsity or with a reckless disregard for the truth or falsity of the statement.

Constitutional Interests

Newsgathering

The constitutional interests establishing a foundation for a reporter's privilege to withhold the identities of confidential sources during civil discovery are rooted in the first amendment, which guards

13. *Id.* at 270.

14. The *New York Times* rule subsequently was extended to include "public figures." *See* Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). The definition of public figure, however, has been a subject of continuing confusion that the Supreme Court has attempted to clarify in several cases. *See* Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979); Hutchinson v. Proxmire, 443 U.S. 111 (1979); Time, Inc. v. Firestone, 424 U.S. 448 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971). At one time, the Court reasoned that a private individual should be subject to the same burden of proof as a public figure whenever he or she is involved in a matter of general public concern. Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971). The Court later rejected this construction, Gertz v. Robert Welch, Inc., 418 U.S. 323, 345-48, 352 (1974), and now seems to require that the private individual voluntarily attract public attention on public issues before he or she can be defined as a public figure. Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 166-69 (1979). For a discussion of the public figure definition in defamation actions, see Note, *Libel—Wolston v. Reader's Digest Association, Inc.: The Definition of Public Figure is Narrowed*, 58 N.C.L. REV. 1042 (1980); Note, *Public Figures and Malice: Recent Supreme Court Decisions Restricting the Constitutional Privilege*, 14 U. RICH. L. REV. 737 (1980); Comment, *The Evolution of the Public Figure Doctrine in Defamation Actions*, 41 OHIO ST. L.J. 1009 (1980).

15. 376 U.S. at 277-79. "The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The Constitutional safeguard, we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' " *Id.* at 269 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

against laws "abridging freedom of speech, or of the press."[16] The Supreme Court has interpreted the first amendment's commitment to a free press as a constitutional safeguard for the widest dissemination of information about public issues to an enlightened citizenry,[17] and has struck down a wide variety of laws that have restricted freedom of the press, including prior restraints on publication,[18] regulation of editorial judgment,[19] taxes based on circulation,[20] and strict liability for defamatory publications.[21] "[S]ince informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern."[22]

The Court, however, has not explicitly recognized a first amendment right to gather news, a journalistic function in which the receipt of information from confidential sources plays an important part.[23] Although the Court has not specifically recognized this right, it has occasionally given the right implicit support. In *Branzburg v. Hayes*,[24] the Supreme Court ordered three reporters to reveal the identities of their confidential sources before a grand jury. The Court concluded that the state's interest in investigating criminal activity was a sufficiently compelling reason to deny the reporters' first amendment claim for a privilege to protect those sources.[25] Although the Court ordered disclosure of the sources, its plurality opinion evidenced implicit support for a constitutional right to gather news. Justice White, writing for the Court, admonished that the result was not a suggestion "that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated."[26]

16. U.S. CONST. amend. I.

17. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964).

18. New York Times Co. v. United States, 403 U.S. 713 (1971); Near v. Minnesota *ex. rel.* Olson, 283 U.S. 697 (1931).

19. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

20. Grosjean v. American Press Co., 297 U.S. 233, 244-45 (1936).

21. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

22. Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

23. Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUNDATION RESEARCH J. 521, 602: "In effect, the Court has failed to accord the newsgathering interest the full measure of favorable procedures, presumptions, and substantive doctrines that normally follow from the determination that a particular interest is truly of First Amendment pedigree. Yet the majority opinions have failed to explain or defend the decision not to give the newsgathering interest full First Amendment status; instead, they have glossed over the problem with empty rhetorical testimonials to the importance of the interest."

24. 408 U.S. 665 (1972).

25. *Id.* at 690.

26. *Id.* at 681. Eight years later, the Court reiterated its *Branzburg* support for newsgathering in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (holding that news reporters have a constitutional right to attend criminal trials). "It is not crucial whether we

Despite the uncertain level of constitutional protection afforded the newsgathering interest, several lower courts have placed newsgathering on firm constitutional footing by interpreting the language in *Branzburg* as a clear constitutional protection for newsgathering.[27] Although the Supreme Court has only afforded newsgathering "some protection,"[28] these lower courts have assumed that *Branzburg* explicitly grants newsgathering first amendment protection, providing reporters with a constitutional shield against disclosure orders that could compromise the newsgathering interest.[29]

Freedom of Expression

Even in the absence of explicit Supreme Court recognition of a constitutional right to gather news under the first amendment, compelled disclosure of confidential sources may be unconstitutional on other grounds. If the practical effect of forced disclosure is to impair the flow of information to the public, it may abridge the first amendment's basic purpose of protecting freedom of expression and communication. As the Court has noted:

> The First Amendment, in conjunction with the Fourteenth, prohibits governments from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." These expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government.[30]

---

describe this right to attend criminal trials to hear, see, and communicate observations concerning them as a 'right of access,' or a 'right to gather information,' for we have recognized that 'without some protection for seeking out the news, freedom of the press could be eviscerated.' " 448 U.S. at 576.

27. *See, e.g.*, Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980) (civil discovery requests for confidential sources to be judged according to a standard balancing reporter's privilege against litigant's asserted need for requested information); Riley v. City of Chester, 612 F.2d 708 (3d Cir. 1979) (adopting a balancing approach with respect to criminal discovery requests); Mize v. McGraw-Hill, Inc., 82 F.R.D. 475 (S.D. Tex. 1979) (civil discovery requests for confidential sources receive balancing test analysis).

28. 408 U.S. 665, 681 (1972). See text accompanying note 26 *supra*.

29. Riley v. City of Chester, 612 F.2d 708, 714 (3d Cir. 1979): "Where a witness claims a privilege founded on the First Amendment of the Constitution, our 'reason and experience' directs us in the first instance to that Amendment. In *Branzburg v. Hayes* the Court acknowledged the existence of First Amendment protection for 'newsgathering.' The interrelationship between newsgathering, news dissemination and the need for a journalist to protect his or her source is too apparent to require belaboring."

30. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 557 (1980). Professor Thomas Emerson has suggested that the first amendment provides the basis for a system of free expression, concluding that "[t]he fundamental meaning of the First Amendment, then, is to guarantee an effective system of freedom of expression suitable for the present times." T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 14-15 (1970). The Court recently reaffirmed the first amendment's commitment to the free flow of information, noting that

A government action may be struck down on first amendment grounds even though it is not designed to restrict free speech. The Court has noted that "laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence."[31] Thus, in *NAACP v. Button*,[32] the Court invalidated a Virginia statute that prohibited the NAACP from retaining its own legal staff to represent litigants in racial discrimination actions when the NAACP was not a party.[33] The Court held that the statute indirectly inhibited the NAACP's freedom to express itself through litigation.[34] Although it acknowledged the state's legitimate interest in regulating the solicitation of legal business, the Court found that the Virginia statute indirectly hindered freedom of speech by decreasing the likelihood that a potential litigant would be advised to seek legal redress for acts of racial discrimination when legal redress offered the only effective method by which a member of an oppressed minority group could fight racial discrimination.[35]

Similarly, compelled disclosure of confidential sources might be held an unconstitutional inhibition on freedom of expression. Confi-

"the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978); *see also* Lamont v. Postmaster General, 381 U.S. 301 (1965) (law requiring addressee to notify post office as a condition to receipt of "communist political propaganda" held to be an unconstitutional restriction on the flow of information by violating the right to free speech).

31. United Mine Workers v. Illinois Bar Ass'n, 389 U.S. 217, 222 (1967); *see also* Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L.J. 317, 337-38 (1970).

32. 371 U.S. 415 (1963).

33. *Id.* at 420-23.

34. *Id.* at 434-37.

35. *See id.* at 435-36. The *Button* case discussed freedom of expression generally, and its language implies a broad applicability in the first amendment area. Justice Brennan, writing for the majority, drew from a wide range of first amendment cases, including Near v. Minnesota *ex. rel.* Olson, 283 U.S. 697 (1931), which struck down prior restraints on publication. NAACP v. Button, 371 U.S. 415, 438 (1963).

The Supreme Court's interchangeable use of prior speech and press cases to support decisions involving free expression reflects the expansive range of first amendment protection. *See generally* Note, *The Right of the Press to Gather Information*, 71 COLUM. L. REV. 838 (1971). For a discussion of the historical grounds for the interchangeable authority of speech and press cases, see Lange, *The Speech and Press Clauses*, 23 U.C.L.A. L. REV. 77 (1975); *see also* Christie, *Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches*, 75 MICH. L. REV. 43, 58 (1976): "It is still asserted, however, that, notwithstanding the historical context, the Constitution does use two terms and therefore the Court has a textual basis for distinguishing between the two freedoms. This contention has, I believe, been thoroughly and convincingly refuted by others. . . . Whatever theoretical merit the position may have, it will almost certainly flounder in practice when it comes time to decide what is covered by the term 'the press.' If the *New York Times* is covered, what about *Screw*, another New York publication? Consider too the person who wants to write a book.

dential sources constitute an important reservoir of information and are instrumental to the process of complete, interpretive news reporting.[36] The possibility that media defendants will be routinely forced to reveal the identities of confidential sources in the course of defamation litigation may discourage them from using confidential information, and may inhibit informants from divulging information. These inhibitions may obstruct effective news reporting, rendering compelled disclosure an unconstitutional restriction of free communication and expression. Because a news source may insist on confidentiality as a condition to providing information to reporters, a judicial or statutory policy that threatens to impair the flow of information from confidential sources by threatening confidentiality should be subject to careful scrutiny under the protective umbrella of the first amendment.[37]

Free Speech Rights of the Source

In addition to the potential inhibiting effect of compelled disclosure on a free press, disclosure can also affect the constitutional rights of the informant. As some confidential sources may be unwilling to speak to reporters because they fear that their identities may be revealed, compelled disclosure may create a climate that inhibits the free speech rights of the source.[38]

The Supreme Court has recognized that confidentiality is sometimes necessary for the uninhibited exercise of first amendment rights.

Will it matter whether this individual is considered a 'scholar'? The practical difficulties seem insurmountable." (footnotes omitted).

The Court has noted that first amendment rights are inseparable. Thomas v. Collins, 323 U.S. 516, 530 (1945) (striking down requirement that labor organizer register with state officials before soliciting support for labor movement): "It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable."

36. See note 47 & accompanying text *infra*. As Justice Stewart observed in his dissenting opinion in *Branzburg*, confidential sources are necessary to the process of complete news reporting, for if the press "is to perform its constitutional mission, [it] must do far more than merely print public statements or publish prepared handouts." Branzburg v. Hayes, 408 U.S. 665, 729 (1972) (Stewart, J., dissenting).

Professor Vincent Blasi notes that print journalists have placed greater emphasis on interpretative reporting, requiring more information from confidential sources. He suggests that this greater need is largely the result of the predominant role of the broadcast media in reporting breaking news. Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 234 (1971).

37. "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." NAACP v. Button, 371 U.S. 415, 439 (1963) (quoting Bates v. City of Little Rock, 361 U.S. 516, 524 (1960)).

38. See notes 49-57 & accompanying text *infra*. *See also* Note, *The Rights of Sources—The Critical Element in the Clash over Reporter's Privilege*, 88 YALE L.J. 1202 (1979); Comment, *The Newsman's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation*, 58 CALIF. L. REV. 1198, 1228-35 (1970).

In *NAACP v. Alabama*,[39] the Court gave support to the right of confidential association by blocking the Alabama Attorney General's attempt to force disclosure of the names of all NAACP members in the state. The Court found that disclosure of the Alabama membership could have the practical effect of inhibiting the right of NAACP members to associate. "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."[40] Two years after *NAACP v. Alabama*, the Court gave support to a right of anonymous speech by holding unconstitutional a local handbill ordinance requiring the identity of the sponsor to be printed on the handbill.[41] Justice Black's majority opinion noted that "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance."[42]

Similarly, in their relationships with reporters, sources may demand privacy before revealing sensitive information. The "fear of reprisal" is a problem for informants who are vulnerable to political or economic attempts to force their silence.[43] For sources, confidentiality is a valuable prerequisite to the communication of sensitive ideas and information to the public, and their freedom of speech may depend on the ability to speak without public identification. In many instances, confidential sources may attempt to pass information to reporters that is critical of public figures. Inhibitions on such criticism may restrict public debate on important issues, limiting precisely the type of speech the first amendment was designed to protect.[44]

The Chill

Underlying the constitutional arguments supporting the protection of confidential news sources is the argument that compelled disclosure actually inhibits the flow of information from confidential informants and the press. Without a chilling effect, or a threat of a chilling effect, the first amendment claims of the press and its sources of information are less likely to be persuasive to a court in a disclosure case.[45]

39. 357 U.S. 449 (1958).

40. *Id.* at 462.

41. Talley v. California, 362 U.S. 60 (1960).

42. *Id.* at 64-65; *see also* Shelton v. Tucker, 364 U.S. 479 (1960) (striking down state law requiring teachers to disclose all organizational affiliations).

43. See notes 47-54 & accompanying text *infra*.

44. For a discussion of the Supreme Court's reluctance to address the question of whether a source has such first amendment rights in a grand jury context, see Murasky, *The Journalist's Privilege: Branzburg and its Aftermath*, 52 TEX. L. REV. 829, 847-49 (1974). Murasky suggests that the Court was reluctant to address the rights of the source because it was disinclined to allow criminals to publicize their conduct through the press.

45. The Supreme Court rejected subjective assertions of chilling effects as a foundation

In *United States v. Caldwell*,[46] a case involving a reporter's refusal to comply with a subpoena ordering him to bring notes and tape recordings of his interviews with officials of the Black Panther organization, several prominent journalists who supported the certiorari petition filed affidavits concerning the essential role of confidential sources in the newsgathering process. One of these journalists emphasized the interpretive value of information received in confidence, noting that "to understand the facts, reporters must constantly appraise the accuracy and meaning of words and the significance of deeds. In that effort, reporters require a background of confidential judgments and observations obtainable only in privacy and in trust."[47]

It is questionable whether the absence of testimonial rights for news reporters chills the flow of information to the public.[48] The potential chilling effect of forced disclosure, however, is a difficult phenomenon to document and does not readily lend itself to quantitative

for a first amendment challenge in Laird v. Tatum, 408 U.S. 1 (1972) (rejecting justiciability of first amendment claim absent a showing of actual or threatened harm to first amendment interests). "Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Id.* at 13-14.

46. 434 F.2d 1081 (9th Cir. 1970), *cert. granted*, 402 U.S. 942 (1971). *Caldwell* was one of three cases consolidated under the Supreme Court's decision in Branzburg v. Hayes, 408 U.S. 665 (1972).

47. Affidavit of Dan Rather, *reprinted in Freedom of the Press: Hearings before the Subcomm. on Constitutional Rights of the Senate Committee on the Judiciary*, 92d Cong., 1st & 2d Sess. 1208 (1971-72). CBS correspondent Mike Wallace included in his affidavit an example of a story dependent on information received confidentially from government employees. "Without that information," Wallace stated, "we could not have constructed the story of how a torpedo project originally scheduled to cost $680,000,000 had risen to a projected $4,000,000,000." Affidavit of Mike Wallace, *Id.* at 1207. The affidavit of Walter Cronkite provided several examples of information received in confidence. "The material that I obtain in privacy and on a confidential basis is given to me on that basis because my news sources have learned to trust me and can confide in me without fear of exposure. In nearly every case, their position, perhaps their very job or career, would be in jeopardy if this were not the case. There are almost daily examples of this. For example: A member of the staff of a United States Senator advised me, far in advance of the announcement, that his employer did not plan to run for reelection. Another person in a similar position tipped me to his employer's intention to seek a higher office. An officer high in Pentagon circles recently offered evidence of pressure high in the military command structure to get the President to cut back on his Viet Nam withdrawal commitments. A bartender told me of fraud in restaurant inspection in New York City. A scientist asserted that the Atomic Energy Commission's safety standards for atomic energy installations were not adequate. None of these persons would have volunteered this information if they thought they would be exposed as the source of the information. In short, I would be unable to obtain much of the material that is indispensable to my work if it were believed that people could not talk to me confidentially." Affidavit of Walter Cronkite, *id.* at 1205.

48. The Supreme Court expressed this doubt in declining to recognize certain testimonial rights for news reporters. *See* Herbert v. Lando, 441 U.S. 153 (1979) (denial of a privilege to refuse discovery into the editorial thought process of journalists); Branzburg v. Hayes, 408 U.S. 665 (1972) (denial of a privilege to withhold the identities of sources before grand juries).

searches for tangible, statistical proof. Several obstacles render any accurate measurement of a chilling effect difficult.

First, the expressed willingness of reporters to suffer the legal consequences of a refusal to disclose the identities of sources may be the incentive that encourages sources to speak.[49] Jailing reporters who honor their commitments of confidentiality, however, imposes a high price on the exercise of first amendment rights.[50] Moreover, the risk that a reporter may go to jail to protect a confidential source may deter a source from coming forward for fear that his or her protection may come at the expense of the journalist.[51]

In addition, reporters are not likely to admit that they have cancelled a story because of fear that its publication might lead to litigation, because such an admission confesses that professional standards were compromised by factors apart from complete and accurate news reporting.[52] A strong journalistic ethic encourages the publication of important stories, even if publication entails legal or financial risks to the news organization. As this commitment is an important professional standard, a reporter or an editor is not likely to admit that a story was not produced for fear of compelled disclosure.

Moreover, the insidious nature of the chilling effect poses the greatest obstacle to its documentation. A journalist cannot know when a potential source is withholding information for fear of identification, because sources choosing to remain silent do not come forward and thus are not easily identified.[53]

49. Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 276-77 (1971); Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. U.L. REV. 18, 47 (1969-70).

50. Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. U.L. REV. 18, 47 (1969-70).

51. *Id.* at 46.

52. Professor Ben Bagdikian, journalism professor and a former national editor at the *Washington Post*, notes: "There is a strong ethic in journalism that militates against failure to produce a story of social importance. The ideal is that a journalist and a journalistic organization will produce a socially significant story at any cost. Fear and expense should not play a part in giving the public important information. That is the ideal. Obviously, it is not universally observed. But it is a strong convention that few journalists or editors like to violate or if they have, to admit it publicly. Consequently, if a reporter or editor is asked if there are important stories that were not produced for fear of enforced disclosure, there will not always be a candid answer." Letter from Professor Ben Bagdikian (July 28, 1981) (copy on file with the *Hastings Law Journal*); *see also* Anderson, *Libel and Press Censorship*, 53 TEX. L. REV. 422, 434 (1974-75).

53. "Sources who decide privately not to take initiatives in contact with journalists and do so because they fear the journalist will be forced to disclose the source, are unknown and therefore cannot be interviewed or surveyed. If the source is explicit with a journalist in deciding against disclosure for fear of forced disclosure, the source is not likely to be known or reached for measurement of chilling effect. And if reached, some sources would be reluctant to respond with candor for the same reason the same source decided not to provide information to the journalist, fear of being identified. . . . The journalist who fails to ob-

Despite the inherent difficulty of quantifying the chilling effect, an examination into the dynamics of newsgathering and news dissemination reveals several ways in which the threat of disclosure can inhibit the free flow of news. First, the potential risk of disclosure and the attendant costs of fighting a legal battle to prevent disclosure may inject considerations of self-censorship into the newsroom decisionmaking process. An editorial decision to publish or hold a story involves many factors. When a story is based largely on information from a confidential source, the possibility that disclosure will be ordered becomes another consideration in an editor's decision whether to publish the story or to withhold it from the public.[54] The threat of litigation to protect a confidential source can be particularly damaging to a publication that lacks the financial resources to sustain the legal costs of protecting a source, and can therefore create an economic disincentive from using sensitive confidential information.[55]

---

tain crucial information from a source, may not produce a story. The lack of a story is not identifiable to the outsider, so it is difficult to interview or survey the reporter who did not do a story." Letter from Professor Ben Bagdikian (July 28, 1981) (copy on file with the *Hastings Law Journal*).

54. "Within the journalistic process there is sometimes an early recognition that the story will require an information transaction that will have to be confidential. A government employee may offer a view of classified or administratively confidential documents. Or a corporate official may offer incriminating evidence against a superior or the corporation; or a prosecutor may offer to make known, privately, some grand jury proceedings. Or an investigation of organized crime will hinge on protracted secret dealings with unsavory characters. Factors for and against proceeding are often argued in shifting and uncertain balances. One factor is calculation of the probability of forced disclosure or some other compromise of the promise of confidentiality." *Id.*

55. In Washington Post Company v. Keogh, Judge Skelley Wright noted: "The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself, especially to advocates of unpopular causes. All persons who desire to exercise their right to criticize public officials are not as well equipped financially as the Post to defend against a trial on the merits. Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors." 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967). *See also* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 (1971): "The very possibility of having to engage in litigation, an expensive and protracted process, is threat enough to cause discussion and debate to 'steer far wider of the unlawful zone,' thereby keeping protracted discussion from public cognizance."

Professor Anderson notes that the costs of litigation create "a system in which the relevant question is not whether a story is libelous, but whether the subject is likely to sue, and if so, how much it will cost to defend." Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 424-25 (1975).

For an account of the interplay between lawyers and journalists in a non-libel setting, see D. HALBERSTAM, THE POWERS THAT BE 572-78 (1979). Halberstam recreates the details of the debate between lawyers and journalists over the decision to publish the Pentagon Papers, a case that was eventually heard by the Supreme Court. *See* New York Times Co. v. United States, 403 U.S. 713 (1971).

Second, the risk of disclosure deters informants, particularly those holding positions in which criticism may not be tolerated. Professor Vincent Blasi, who conducted a survey attempting to quantify the inhibiting effect of forced disclosure, concluded that the disclosure risk does not cause "sources to 'dry up' completely," although it does have the effect of " 'poisoning the atmosphere' so as to make insightful, interpretive reporting more difficult."[56]

Empirical evidence that compelled disclosure of news sources inhibits the free exercise of first amendment rights is not always a necessary element of a case challenging the constitutionality of disclosure orders,[57] but the Supreme Court has rejected several first amendment challenges in the absence of empirical proof of a chilling effect. In *Buckley v. Valeo*,[58] the Supreme Court upheld campaign contribution disclosure requirements, emphasizing that the lack of empirical evidence that such requirements would inhibit the association rights of minor political parties left the first amendment interest too speculative to outweigh the public interest in reducing government corruption through disclosure.[59] In *Branzburg v. Hayes*,[60] the Court found that the potential chilling effect of confidential source disclosure was "to a great extent speculative,"[61] and concluded that the speculative harm to first amendment interests was insufficient to overcome the public interest in disclosure before grand juries investigating criminal activity.[62]

The Court, however, has not consistently required empirical evidence of chilling effects in first amendment cases.[63] Consequently, the

56. Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 284 (1971). Professor Blasi based his findings on interviews, questionnaires, and a quantitative survey.

57. See note 64 & accompanying text *infra*.

58. 424 U.S. 1 (1976) (per curiam).

59. *Id.* at 71-72.

60. 408 U.S. 665 (1972).

61. *Id.* at 693-94.

62. *Id.* at 695.

63. The Court has struck down state laws that posed only theoretical threats to the free exercise of first amendment rights. *See, e.g.*, Talley v. California, 362 U.S. 60 (1960) (state law banning anonymous handbills infringes free speech); Smith v. California, 361 U.S. 147 (1959) (elimination of scienter requirement in obscenity cases inhibits free speech); Speiser v. Randall, 357 U.S. 513 (1958) (law denying tax exemptions to persons refusing to sign loyalty declaration constitutes deprivation of first amendment liberties without due process); *see also* Murasky, *The Journalist's Privilege: Branzburg and its Aftermath*, 52 TEX. L. REV. 829, 853-56 (1974-75). Justice Stewart, dissenting in *Branzburg*, criticized the plurality's emphasis on empirical data, noting that the Court had "never before demanded that First Amendment rights rest on elaborate empirical studies demonstrating beyond any conceivable doubt that deterrent effects exist . . . ." Branzburg v. Hayes, 408 U.S. 665, 733 (1972). In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the Court concluded that a fear of damages awards in libel actions can deter the press from disseminating truthful information to the public about issues of public importance. *Id.* at 277. This conclusion, which was

Court has not articulated a clear rule for the requirement of empirical proof of chilling effects in cases challenging state conduct on first amendment grounds. Because of the Court's traditional view that first amendment freedoms are delicate and need "breathing space" to survive,[64] however, a speculative harm to a first amendment interest may provide a sufficient basis for resolving evidentiary doubts in favor of protecting the first amendment interest.

The Privilege

A journalist's testimonial privilege to withhold the identity of a confidential source from compelled disclosure has been rejected by the Supreme Court in the context of grand jury investigations.[65] Although the Court has not yet addressed the question of privilege in the context of public figure defamation actions, this privilege has received mixed acceptance in lower courts.[66] In resolving the issues surrounding this privilege, a court must weigh the constitutional interests protecting the confidentiality of the source against the public figure plaintiff's need for evidence to prove with "convincing clarity"[67] that a false, defamatory statement was published with knowing or reckless falsity.[68]

Opponents of a reporter's privilege in defamation suits argue that a testimonial privilege protecting the source of a defamatory statement would allow a journalist to escape liability by hiding behind an asserted belief in the reliability of a confidential source.[69] As "reckless disregard" requires the plaintiff to show that the defendant publisher "in fact entertained serious doubts as to the truth of his publication,"[70] a defamation plaintiff could find it difficult, if not impossible, to overcome a media defendant's claim that there was no "subjective awareness of probable falsity."[71] Furthermore, a privilege foreclosing disclosure of defamatory sources could encourage unjustified attacks against public figures through the media by allowing a source to pass deliberate falsehoods to the press while avoiding any personal liability for their content.[72]

Courts deciding whether to order disclosure of a source in defamation actions are provided with little judicial guidance. The absence of a

unsupported by statistical documentation, formed the basis for the Court's adoption of the "actual malice" standard.

64. NAACP v. Button, 371 U.S. 415, 433 (1963).
65. Branzburg v. Hayes, 408 U.S. 665 (1972).
66. See notes 102-03 & accompanying text *infra*.
67. New York Times Co. v. Sullivan, 376 U.S. 254, 285-86 (1964).
68. *Id.* at 280; *see also* RESTATEMENT (SECOND) OF TORTS § 580A (1977).
69. *See, e.g.*, WRIGHT & GRAHAM, *supra* note 9, at 791-92.
70. St. Amant v. Thompson, 390 U.S. 727, 731 (1968).
71. Gertz v. Robert Welch, Inc., 418 U.S. 323, 334 n.6 (1974).
72. WRIGHT & GRAHAM, *supra* note 9, at 791.

federal law to protect reporter-source relationships[73] and the lack of Supreme Court guidance in this area have forced the courts to rely upon uncertain prior case law.[74] The results have been inconsistent interpretations of the case law and inconsistent interpretations of applicable standards whenever a court balances the interests of the parties in reaching a result.[75]

Branzburg v. Hayes and Herbert v. Lando

Although the Supreme Court has not addressed the issue of source disclosure in public figure defamation actions, it addressed the problem in related contexts in *Branzburg v. Hayes*[76] and *Herbert v. Lando*.[77]

In *Branzburg*, a divided Supreme Court rejected an absolute privilege to refuse disclosure of confidential sources during grand jury investigations. Although several courts have held *Branzburg* to be dispositive of privilege claims in defamation cases,[78] most courts reject its application in civil cases because its scope was limited to the issue of a reporter's obligation to testify during grand jury investigations.[79] In addition, there may be an interest in compelling testimony in criminal

73. Although a federal shield law, which would protect a journalist's right to withhold the identities of confidential sources, has not been adopted, it has been proposed several times. *See* Note, *The Newsman's Privilege After Branzburg: The Case For a Federal Shield Law*, 24 U.C.L.A. L. REV. 160 (1976).

Twenty-six states have enacted shield laws, varying in the range of protection they offer to journalists and their sources. Several state shield laws exempt defamation actions from their coverage or severely restrict the applicability of their use in defamation cases. *See* Note, *Shield Statutes: A Changing Problem in Light of Branzburg*, 25 WAYNE L. REV. 1381, 1386-92 (1979). For a discussion of the limitations of shield laws and the various discrepancies among them, see Note, *State Newsman's Privilege Statutes: A Critical Analysis*, 49 NOTRE DAME LAW. 150 (1973). For a reproduction of current state shield laws, see R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 621-48 (1980).

California amended its constitution in 1980 to protect journalists from contempt citations for refusing to disclose sources. The amendment protects print and broadcast journalists from being "adjudged in contempt by a judicial, legislative, or administrative body, or any other body having the power to issue subpoenas, for refusing to disclose the source of any information procured while so connected or employed . . . , or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public." CAL. CONST. art. I, § 2(b).

74. See notes 79-109 & accompanying text *infra*.

75. *Id.*

76. 408 U.S. 665 (1972).

77. 441 U.S. 153 (1979).

78. These courts consider *Branzburg* to be dispositive in libel actions or other civil actions as a general rejection of privileges for news reporters to withhold testimony from the courts. *See* Caldero v. Tribune Publishing Co., 98 Idaho 288, 562 P.2d 791, *cert. denied*, 434 U.S. 930 (1977); Downing v. Monitor Publishing Co., 120 N.H. 383, 415 A.2d 683 (1980).

79. 408 U.S. at 682. *See, e.g.*, Riley v. City of Chester, 612 F.2d 708 (3d Cir. 1979); Baker v. F & F Investment, 470 F.2d 778 (2d Cir.), *cert. denied*, 411 U.S. 966 (1972); Gilbert v. Allied Chemical Corp., 411 F. Supp. 505 (E.D. Va. 1976).

proceedings stemming from the constitutional right of a criminal defendant to examine the evidence against him or her.[80] No comparable interest is implicated in a civil proceeding in which a plaintiff seeks only to recover damages.[81]

In 1979, the Supreme Court rendered its first opinion concerning discovery in defamation cases in *Herbert v. Lando*,[82] holding that journalists in a defamation action did not have an absolute privilege to block discovery into the editorial process that resulted in an allegedly defamatory report concerning a public figure. In *Herbert*, a retired army officer, Colonel Anthony Herbert, brought a defamation action against the Columbia Broadcasting System for suggesting that he had lied in a television report about his claims that superior officers had covered up war crimes. During discovery, Herbert deposed the producer of the report, Barry Lando, and inquired about his state of mind during the editorial process in an attempt to discover evidence of recklessness to satisfy the *New York Times* standard. Lando refused to answer questions about his state of mind, claiming a first amendment privilege to withhold such information to promote uninhibited editorial discussion in the newsroom. Although the Second Circuit upheld the privilege as absolute,[83] the Supreme Court reversed, concluding that any editorial privilege, absolute or qualified, would impose too great a burden on a plaintiff's ability to prove actual malice under the *New York Times* rule.[84] As the plaintiff must prove that the defendant had a "subjective awareness of probable falsity,"[85] the Court concluded that an editorial privilege, barring discovery into the journalist's editorial thought process, would foreclose the plaintiff's ability to prove his case.[86]

80. U.S. CONST. amend. VI.

81. Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. U.L. REV. 18, 25 (1969). Moreover, the five to four division of the Court in *Branzburg* weakens the strength of its holding rejecting the reporter's privilege. Justice Powell's concurring opinion was enigmatic, embracing a balancing test that weighed freedom of the press against the general obligation of citizens to testify with respect to criminal conduct. 408 U.S. at 710 (Powell, J., concurring). At least one federal court has interpreted *Branzburg* to constitute a qualified first amendment privilege by combining Justice Powell's concurrence with the *Branzburg* dissenters "to provide a majority of five justices that would accept the proposition that newsmen are entitled to at least a qualified First Amendment privilege." Gilbert v. Allied Chemical Corp., 411 F. Supp. 505, 509 (E.D. Va. 1976).

82. 441 U.S. 153 (1979).

83. 568 F.2d 974 (2d Cir. 1977).

84. 441 U.S. at 170. In his dissent, Justice Brennan proposed a qualified editorial privilege for journalists, allowing discovery into a journalist's editorial thought process only after a prima facie showing of defamatory falsehood was made. *Id.* at 197-98 (Brennan, J., dissenting).

85. Gertz v. Robert Welch, Inc., 418 U.S. 323, 334 n.6 (1974); St. Amant v. Thompson, 390 U.S. 727 (1968).

86. 441 U.S. at 170. During oral argument, Chief Justice Burger asked, "How do you

Some lower courts have used the Supreme Court's rejection of an editorial privilege in public figure defamation suits as grounds for rejecting a reporter's privilege to refuse discovery of confidential sources. In *DeRoburt v. Gannett Co.*,[87] for example, the president of a small Pacific island republic sued Gannett Company for an allegedly libelous article reporting that he had violated standards of international diplomacy by loaning money to a separatist movement in another country. Ordering disclosure of the confidential sources who provided the information, the Hawaii District Court cited *Herbert* as authority for its statement that a privilege must yield if it erects "an impenetrable barrier to the plaintiff's use of such evidence on his side of the case."[88]

Similarly, the New Hampshire Supreme Court ordered disclosure of the source of a story that suggested that a chief of police had lied about the circumstances under which he had sustained a gunshot wound.[89] The court emphasized the evidentiary burdens a privilege places on a public figure plaintiff and interpreted *Herbert* as indicating that "to meet the *New York Times* standard, any press privilege must give way before the First Amendment."[90] The court granted the motion compelling disclosure of the source and ruled that continued refusal to disclose would give rise to a presumption that there was no source.[91] In effect, this presumption satisfies the *New York Times* standard for the plaintiff because it amounts to a showing that the defendant was reckless for publishing without a source.[92]

These applications of the *Herbert* case are questionable in light of the majority's conclusion that the denial of an editorial privilege would

probe for the presence or absence of malice if you can't ask what was the state of mind at the time this or that was done?" It was a practical question that persuaded a six vote majority to reject the editorial privilege claim. *See* Oakes, *Proof of Actual Malice in Defamation Actions: An Unsolved Dilemma*, 7 HOFSTRA L. REV. 655, 655 (1979). For a general discussion of *Herbert v. Lando*, see Ashdown, *Editorial Privilege and Freedom of the Press: Herbert v. Lando in Perspective*, 51 U. COLO. L. REV. 303 (1980); Franklin, *Reflections on Herbert v. Lando*, 31 STAN. L. REV. 1035 (1979); Friedenthal, *Herbert v. Lando: A Note on Discovery*, 31 STAN. L. REV. 1059 (1979); Note, *Herbert v. Lando: The Supreme Court's Infidelity to New York Times Co. v. Sullivan*, 13 U. CAL. D.L. REV. 374 (1980). Justice Brennan has criticized the press for overreacting to the *Herbert* decision. *See* Justice Brennan, Dedicatory Address for the S.I. Newhouse Center for Law and Justice (October 17, 1979), *reprinted in* 32 RUTGERS L. REV. 173, 179 (1979).

87. 507 F. Supp. 880 (D. Hawaii 1981).

88. *Id.* at 883 (quoting Herbert v. Lando, 441 U.S. at 170).

89. Downing v. Monitor Publishing Co., 120 N.H. 383, 415 A.2d 683 (1980).

90. *Id.* at 386-87, 415 A.2d at 686; *see also* Sierra Life Ins. Co. v. Magic Valley Newspapers, Inc., 101 Idaho 795, 800-01, 623 P.2d 103, 108-09 (1980) (citing *Herbert* as authority for refusal to recognize first amendment privilege against disclosure).

91. 120 N.H. at 387, 415 A.2d at 686.

92. One journalist has expressed fear that this method of enforcing court orders to disclose could facilitate harassment suits by plaintiffs wishing to silence critics. Letter from Fred Graham (July 28, 1981) (copy on file with the *Hastings Law Journal*).

not have an inhibiting effect on the press.[93] Because of the difference between an editorial privilege and a privilege to protect news sources, the application of *Herbert* to cases involving source disclosure may be strained. Denial of an editorial privilege is less likely to foreclose channels of information than is disclosure of confidential sources because source disclosure can directly hinder the publication of news by diminishing the safety of confidential relationships between reporters and their sources. Although the lack of an editorial privilege may inhibit the publication of information already in the news organization's possession, the risk of source disclosure may affect the availability of information by limiting the flow of information from sources to reporters.[94]

In a recent case,[95] the Fifth Circuit distinguished the editorial privilege denied to journalists in *Herbert* from the privilege to withhold a source's identity. It reasoned that the denial of a privilege to protect sources would be more likely to have a chilling effect on the publication of news.[96]

Hence, the two Supreme Court cases most closely related to the problem of source disclosure do not resolve the problem. *Herbert* concerns defamation discovery, but is limited to the claim of editorial privilege, which the Court assumes will not inhibit the publication of news. Moreover, the denial of an editorial privilege is less likely to compromise the constitutional rights of another party, such as a confidential source in a vulnerable position. *Branzburg*, on the other hand, focuses on grand jury proceedings, which have interests and constitutional implications that are largely foreign to testimonial conflicts in civil cases.

Garland v. Torre

Because of the limited range of Supreme Court precedent, courts seek guidance elsewhere when deciding whether to compel the disclosure of a source. Generally, courts have relied upon *Garland v. Torre*,[97] a Second Circuit case decided in 1958. In *Garland*, actress Judy Garland sued the Columbia Broadcasting System because an unnamed network executive had allegedly called her "overweight." Garland sought the identity of the source from Marie Torre, the reporter who wrote the article quoting the executive, but Torre refused to reveal her source. Although the district court ordered disclosure of the inform-

93. "Of course, if inquiry into editorial conclusions threatens the suppression not only of information known or strongly suspected to be unreliable but also of truthful information, the issue would be quite different." 441 U.S. 153, 172 (1979).

94. See notes 54-56 & accompanying text *supra*; *see also* Note, *Source Protection in Libel Suits After Herbert v. Lando*, 81 COLUM. L. REV. 338, 361-62 (1981).

95. Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981).

96. *Id.* at 725. For a discussion of *Miller*, see notes 121-29 & accompanying text *infra*.

97. 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

ant's identity, Torre still refused to reveal the source and was held in criminal contempt. The Second Circuit affirmed the contempt finding, concluding that the identity of the confidential source was necessary to Garland's case and that the interest in preserving the court's power to compel testimony from witnesses outweighed Torre's claim of constitutional privilege.[98]

A three-part test has evolved from *Garland*. Disclosure of the source is required if: (1) the information is relevant to the plaintiff's claim; (2) the information cannot be obtained by alternative means; and (3) the information requested goes "to the heart of the plaintiff's claim."[99] Most courts continue to apply the *Garland* standards in defamation actions involving problems of confidential source reliability.[100] Several considerations, however, weaken the basis for continued adherence to the *Garland* standards.

First, it is unclear whether *Garland* established a qualified privilege for journalists to withhold source identities. Several courts have explicitly interpreted *Garland* as a rejection of any reporter's privilege,[101] while others have interpreted it to be a clear recognition of a qualified privilege.[102] Whether a court recognizes or rejects a qualified privilege is important because the recognition of a qualified privilege requires the party seeking disclosure to prove that the necessity of disclosure outweighs the first amendment interest in protecting the confidential source.[103] A plaintiff's bare assertions that disclosure of the

98. *Id.* at 549-50.

99. *Id.* at 549-51; *see also* Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 709, 737-38 (1975).

100. *See* Mize v. McGraw-Hill, Inc., 82 F.R.D. 475, 477 (S.D. Tex. 1979); *see also* Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 709, 743 (1975).

101. *See, e.g.*, Caldero v. Tribune Pub. Co., 98 Idaho 288, 562 P.2d 791, *cert. denied*, 434 U.S. 930 (1977); Dow Jones & Co., Inc. v. Superior Court, 364 Mass. 317, 330 N.E.2d 847 (1973).

102. *See, e.g.*, Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977) (no compulsory disclosure in course of "fishing expedition"); Senear v. Daily Journal American, 27 Wash. App. 454, 618 P.2d 536 (1980) (privilege on non-disclosure of confidential news source in civil case); Winegard v. Oxberger, 258 N.W.2d 847 (Sup. Ct. Iowa 1977), *cert. denied*, 436 U.S. 905 (1978) (limited privilege subordinated by compelling state interest).

103. In recognizing such a qualified privilege, the Court of Appeals for the District of Columbia noted recently: "In general, when striking the balance between the civil litigant's interest in compelled disclosure and the public interest in protecting a newspaper's confidential sources, we will be mindful of the preferred position of the First Amendment and the importance of a vigorous press. Efforts will be taken to minimize impingement upon the reporter's ability to gather news. Thus in the ordinary case the civil litigant's interest in disclosure should yield to the journalist's privilege. Indeed, if the privilege does not prevail in all but the most exceptional cases, its value will be substantially diminished. Unless potential sources are confident that compelled disclosure is unlikely, they will be reluctant to disclose any confidential information to reporters." Zerilli v. Smith, 656 F.2d 705, 712 (D.C. Cir. 1981).

source is needed to prove his or her case would be insufficient to overcome the first amendment presumption against disclosure.[104]

Second, the standards of the three-part test are applied inconsistently. Some courts have interpreted the requirement that other means of obtaining the information be exhausted, while other courts have compelled disclosure without requiring the plaintiff to exhaust other means of obtaining the information.[105] In *Carey v. Hume*,[106] for example, the Court of Appeals for the District of Columbia ordered a reporter to reveal the source of an allegedly libelous column. The article claimed that the plaintiff, a United Mine Workers official, had stolen records from the office of the UMW president to keep them from government investigators. Although the reporter admitted that the source was a UMW employee, he would not name the source. The court, following the *Garland* tests, ordered disclosure although the plaintiff might have obtained the information by deposing UMW employees, reasoning that deposition proceedings in search of relevant information would be too burdensome.[107] Thus, under *Carey*, the point at which the alternative means test will be satisfied remains uncertain.[108]

Third, the importance of the first amendment interest in *Garland*

104. *Compare* Gilbert v. Allied Chemical Corp., 411 F. Supp. 505, 510 (E.D. Va., 1976) (recognition of first amendment privilege to refuse disclosure absent a showing that refusal to disclose blocks practical access to information crucial to the moving party's case) *with* Dow Jones & Co. v. Superior Court, 364 Mass. 317, 303 N.E.2d 847 (1973) (complete rejection of any first amendment privilege to refuse disclosure of confidential sources).

105. *See, e.g.*, Carey v. Hume, 492 F.2d 631, 638-39 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974) (alternative means of obtaining the information too burdensome); Adams v. Associated Press, 46 F.R.D. 439, 441 (S.D. Tex. 1969), *cert. dismissed*, 402 U.S. 901 (1971) (no attempt to obtain the information through alternative means).

106. 492 F.2d 631 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974).

107. *Id.* at 638-39. Eventually, Hume's source, a UMW employee with family ties to the senior Union Counsel, came foward voluntarily under informal court assurances that harassment of her would not be tolerated. The case went to trial in 1975, and the verdict went to the defendants. Letter from Brit Hume (July 21, 1981) (copy on file with the *Hastings Law Journal*).

108. Perhaps part of the confusion stems from the *Garland* opinion's lack of clear language concerning alternative discovery measures. It does not specify the degree to which alternative discovery measures must be "exhausted" before ordering disclosure. "While it is possible that the plaintiff could have learned the identity of the informant by further discovery proceedings directed to CBS, her reasonable efforts in that direction had met with singular lack of success." Garland v. Torre, 259 F.2d 545, 551 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958). Several courts and commentators have interpreted the standard to be one of "exhaustion." *See, e.g.*, Mize v. McGraw-Hill, Inc., 82 F.R.D. 475, 477 (S.D. Tex. 1979); Zerilli v. Bell, 458 F. Supp. 26, 29 (D.C. 1978); Winegard v. Oxberger, 258 N.W.2d 847, 852 (Sup. Ct. Iowa), *cert. denied*, 436 U.S. 905 (1978); *see also* Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 709, 742 (1975). Other courts have given the standard a less restrictive definition. *See, e.g.*, Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 438 (10th Cir. 1977) (whether the party seeking information has independently attempted to obtain the information elsewhere and has been unsuccessful); Carey

was understated. *Garland* was decided six years before the Court in *New York Times Co. v. Sullivan* fundamentally changed the law of libel by bringing defamatory statements within the ambit of constitutional protection. Although it has been asserted that *Garland* has continued vitality despite the fact that it was decided before *New York Times*,[109] the opinion has been criticized as antiquated.[110] When *Garland* was decided, the public interest in compelling testimony to aid the powers of the court system was weighed against the reporter's private relationship with his or her source.[111] Since *New York Times*, however, this interest has shifted from a private relationship between reporter and source to a public interest in the flow of news.[112]

In effect, the first amendment interest in *Garland* was narrowly defined, discounting its constitutional value by labelling it a reporter's individual exercise of first amendment rights rather than a public interest in the free dissemination of information. Standing against a public

v. Hume, 492 F.2d 631, 638 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974) (litigant cannot be made to carry wide-ranging and onerous discovery burdens).

In granting a stay of a contempt citation issued against a reporter who refused to disclose the identities of his confidential informants before the Massachusetts Commission on Judicial Conduct, Justice Brennan noted the importance of seeking the information from other sources. "Assuming that there is at least a limited First Amendment right to resist intrusion into newsgatherers' confidences, this case presents an apt occasion for its invocation. . . . [R]espondent judge could have obtained the information sought from the applicant by other adequate—albeit somewhat roundabout—methods. Thus, this case does not present a question of necessity for the confidences subpoenaed. What is ranged against the asserted First Amendment interests of the applicant is essentially respondent's convenience." *In re* Roche, 448 U.S. 1312, 1316 (1980).

109. *See* Carey v. Hume, 492 F.2d 631, 635 (D.C. Cir. 1974), *cert. dismissed*, 417 U.S. 938 (1974).

110. "The balancing process in *Garland* was based upon a common law premise that the interest of the reporter in protecting a source is a *private* one, which must yield to the superior public interest in the administration of justice. That premise was refuted by *New York Times*." (emphasis in original). Caldero v. Tribune Publishing Co., 98 Idaho 288, 302, 562 P.2d 791, 805 (1977), *cert. denied*, 434 U.S. 930 (1977) (Donaldson, J., dissenting).

111. "Without question, the exaction of this duty to testify impinges sometimes, if not always, upon the First Amendment freedoms of the witness. Material sacrifice and the invasion of personal privacy are implicit in its performance. The freedom to choose whether to speak or be silent disappears." Garland v. Torre, 259 F.2d 545, 549 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

112. *See* Caldero v. Tribune Publishing Co., 98 Idaho 288, 562 P.2d 791, 805-06 (1977), *cert. denied*, 434 U.S. 930 (1977) (Donaldson, J., dissenting). Justice Stewart, who wrote the opinion in *Garland*, later retreated from *Garland's* underlying principle that freedom of the press "must give place under the Constitution to a paramount public interest in the fair administration of justice." 259 F.2d at 549. Fourteen years later, in his *Branzburg* dissent, Justice Stewart wrote: "In striking the proper balance between the public interest in the efficient administration of justice and the First Amendment guarantee of the fullest flow of information, we must begin with the basic proposition that because of their 'delicate and vulnerable' nature, . . . and their transcendent importance for the just functioning of our society, First Amendment rights require special safeguards." 408 U.S. at 738 (Stewart, J., dissenting).

interest in the integrity of the judicial process, the reporter's privilege was easily dismissed.[113] If the first amendment interest is redefined as part of the "national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open,"[114] the constitutional value of maintaining the confidentiality of sources increases, creating the likelihood that the interest in uninhibited news flow will receive greater weight in the balancing process.

Underlying the *Garland* court's emphasis on judicial integrity was the desire to preserve judicial power to compel relevant testimony. This interest in judicial power diminished the force of the reporter's first amendment claim for a privilege to protect confidential sources.[115] The interest in administrative integrity has been asserted in more recent disclosure cases.[116] Hence, a defamation plaintiff, seeking to compel disclosure of a journalist's source of information, may not only claim an interest in obtaining evidence to prove his or her case, but may also assert the general necessity of disclosure as part of a judicial obligation to seek the truth through the disclosure of all relevant evidence.

The administrative integrity of the judicial process, however, is not a goal in itself. Its primary importance is derived from its relationship to the legal objectives of conflict resolution and redress of injury. In the absence of ultimate conflict or injury, administrative machinery lacks its underlying purpose.

The Supreme Court has provided some authority for the rejection of administrative interests as a legitimate basis for the restriction of first amendment rights. In *Watkins v. United States*,[117] a witness summoned before a congressional subcommittee on unamerican activities refused to answer questions about the possible communist associations of people he knew, and consequently was convicted of a misdemeanor for his refusal. Finding no valid legislative purpose for such inquiries, the Supreme Court overturned the conviction and concluded that compelled testimony could not be justified even though congressional investigatory authority was broad and essential to the legislative process.[118]

113. "But '[t]he personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public.' " Garland v. Torre, 259 F.2d at 549 (quoting Blair v. United States, 250 U.S. 273, 281 (1919)).

114. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

115. 259 F.2d 545, 549 (2d Cir. 1958).

116. *See* Winegard v. Oxberger, 258 N.W.2d 847 (Sup. Ct. Iowa), *cert. denied*, 436 U.S. 905 (1978); Caldero v. Tribune Publishing Co., 98 Idaho 288, 562 P.2d 791, 805, *cert. denied*, 434 U.S. 930 (1977); Dow Jones & Co. v. Superior Court, 364 Mass. 317, 303 N.E.2d 847 (1973).

117. 354 U.S. 178 (1957).

118. *Id.* at 187.

> We cannot simply assume . . . that every congressional investigation is justified by a public need that overbalances any private rights affected. To do so would be to abdicate the responsibility placed by the Constitution upon the judiciary to insure that the Congress does not unjustifiably encroach upon an individual's right to privacy nor abridge his liberty of speech, press, religion or assembly.[119]

Lacking a legislative purpose, the congressional subcommittee's investigation had no legitimate basis for compelling the witness to answer questions about the political affiliations of others. In a defamation action in which compulsory disclosure of news sources is sought, a court balancing the competing interests of the parties should be aware of the constitutional values at stake. Asserting that disclosure is necessary to vindicate the procedural powers of the court says little about the underlying purpose of the procedure or the importance of competing values.

Towards Greater First Amendment Protection

Because of the limitations of prior case law governing source disclosure, several courts have devised their own solutions to the problem.[120] A few recent cases demonstrate the potential for a more thoughtful approach to the constitutional dimensions of the controversy and show the greater willingness of courts to accept new ideas for the administration of a qualified privilege for reporters to protect their confidential sources.

Miller v. Transamerican Press[121] was the first federal appellate case to address the problem of confidential source disclosure in a defamation action since the Supreme Court's decision in *Herbert v. Lando*.[122] In 1972, *Overdrive* magazine, owned by Transamerican Press, published approximately 59,000 copies of an issue containing an article about a series of loans made from a regional pension fund of the Teamsters Union. A paragraph in the article suggested that one of the fund's trustees had embezzled money from the fund through a fraudulent loan. Six months later, the trustee filed a libel action against Transamerican Press in federal district court. After several unsuccessful attempts to force disclosure of the informant's identity, the plaintiff convinced the court in 1977 to order disclosure of the source.[123] Continued noncompliance by the defendant led to an interlocutory appeal

119. *Id.* at 198-99.

120. *See, e.g.*, Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980); Miller v. Transamerican Press, 621 F.2d 721 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); Senear v. Daily Journal American, 27 Wash. App. 454, 618 P.2d 536 (1980).

121. 621 F.2d 721, 725 (5th Cir. 1980).

122. 441 U.S. 153 (1979).

123. 621 F.2d at 723.

to the Fifth Circuit, which affirmed the lower court in 1980.[124]

The Fifth Circuit distinguished *Miller* from *Herbert* by finding that the arguments in favor of a privilege to protect sources were more persuasive than those in favor of a privilege to protect the editorial process, because source disclosure was more likely to inhibit the publication of news.[125] The court ruled in favor of disclosure based on *Garland v. Torre*,[126] concluding that its three-part test was satisfied.[127] The Fifth Circuit underscored the significance of *Miller* three months later, however, when it supplemented its opinion by adding a requirement that the plaintiff show "substantial evidence that the challenged statement was published and is both factually untrue and defamatory" before disclosure can be ordered.[128] In denying a rehearing, the court concluded from the record that this requirement, along with the *Garland* test, was satisfied.[129] The addition of this test, which requires substantial evidence of basic elements of the plaintiff's cause of action for defamation before disclosure is ordered, indicates judicial dissatisfaction with the *Garland* standards.

Miller is one of several recent cases requiring a stronger showing of necessity by the plaintiff than is required under *Garland* before disclosure can be ordered.[130] These cases represent judicial efforts to adopt a less mechanical approach to the first amendment conflict between a plaintiff's evidentiary requirements and the demands of the first amendment. As these cases imply, the problem with the *Garland* standards is that they fail to provide sufficient protection for the first

124. *Id.* at 727.

125. *Id.* at 725.

126. 259 F.2d 545 (2d Cir. 1958).

127. Miller v. Transamerican Press, Inc., 621 F.2d at 726-27.

128. 628 F.2d 932 (5th Cir. 1980).

129. *Id.*

130. *See, e.g.*, Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980); Senear v. Daily Journal American, 27 Wash. App. 454, 618 P.2d 536 (1980). Although *Bruno* was a private individual libel action, and thus did not require that the *New York Times* knowing and reckless falsity standard be met as a basis for liability, the court emphasized that the use of judicial formulas may inadequately consider the first amendment interests against disclosure of news sources. 633 F.2d at 598. "We deliberately refrain from further categorizing with any precision what inquiries should be made by the court or in what sequence. . . . While obviously the discretion of the trial judge has wide scope, it is a discretion informed by an awareness of First Amendment values and the precedential effect which decision in any one case would be likely to have. Given the sensitivity of inquiry in this delicate area, detailed findings of fact and explanation of the decision would be appropriate." *Id.* In *Senear*, an appeals court required that a libel plaintiff convince the trial court that there is "independent merit" to the basic elements of the libel action, and that "the First Amendment interests of the news media are outweighed by the rights and interests of the litigant" before disclosure can be ordered. Both tests were in addition to the *Garland* standards. 27 Wash. App. at 473, 618 P.2d at 546; *see also* Cervantes v. Time, 464 F.2d 986, 992-93 (8th Cir.), *cert. denied*, 409 U.S. 1125 (1972) (rejecting necessity for disclosure upon showing that media defendant thoroughly checked its story before publication).

amendment values at stake. The primary focus of the *Garland* standards is relevance, an uncertain veil of protection against frivolous or abusive attempts by plaintiffs seeking to discover the identities of confidential sources. Moreover, the tests are susceptible to arbitrary balancing by courts, which may use the *Garland* formula to justify a preformed conclusion.[131]

Modifying the Standards

Under the *Garland* standards, a plaintiff must show that the identity of the confidential source is relevant to a critical part of the case, and that the information sought is unavailable through other means. The *Garland* standards, however, balance the constitutional interests against an interest that is defined strictly in terms of a plaintiff's cause of action. The *Garland* formula does not require that a defamation plaintiff demonstrate an underlying necessity for disclosure, a necessity that goes beyond the mechanics of a cause of action because it represents a competing interest that genuinely deserves compensation or protection.[132] Only by requiring more stringent tests before compelling disclosure will the first amendment interests be adequately protected. In addition to the *Garland* standards, a plaintiff should provide substantial evidence of actual injury and of the likelihood of success on the merits of his or her claim before disclosure is ordered.[133]

131. Professor Emerson suggests that the balancing test is easily manipulated to reach a judge's preconceived decision. "[C]ourts in fact seldom apply the balancing test in a serious way. Even the leading experts on balancing, Justices Frankfurter and Harlan, have been unable to demonstrate convincingly that the balancing technique actually considers and evaluates all the relevant factors. In the hands of most judges, the balancing test comes to be nothing more than a way of rationalizing preformed conclusions." T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 718 (1970).

132. The third prong of the *Garland* test requires that disclosure of the informant's identity go "to the heart of the plaintiff's claim." 259 F.2d at 550. Courts, however, have tailored the test to the mechanics of a defamation cause of action and have examined its applicability within that limited framework. In Carey v. Hume, 492 F.2d 631 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974), the court found that the source's identity went to the heart of the plaintiff's claim as evidence intended to show recklessness under the *New York Times* rule. 492 F.2d at 637. In Miller v. Transamerican Press, 621 F.2d 721 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981), the court found the third test of the *Garland* standards satisfied, ruling that the plaintiff had a compelling interest in the information sought because it was the only way he could prove reckless falsity. 621 F.2d at 726-27.

133. The adoption of balancing test factors, however, assumes that a balancing test is appropriate under the circumstances. The Supreme Court has held that first amendment freedoms can only be regulated when the state presents a countervailing interest that is "compelling." NAACP v. Button, 371 U.S. 415, 438 (1963). However, courts in source disclosure cases generally have not employed the compelling state interest test, which would require strict scrutiny of a state interest impinging on constitutionally protected rights. *But cf.* Zerilli v. Bell, 458 F. Supp. 26 (D.C. 1978) (rejecting plaintiff's interest in bringing suit under the Privacy Act as insufficiently compelling to justify disclosure of news sources). There may be precedent for an intermediate test, falling between the compelling state inter-

Actual Injury

One standard capable of offering more concrete protection to first amendment interests in source disclosure cases is the requirement that the plaintiff provide substantial evidence of actual injury or harm before disclosure is compelled.

The Supreme Court has held that speculative or hypothetical harm to an interest competing with a first amendment interest is an insufficient basis for an action that impairs first amendment rights. In *Tinker v. Des Moines Independent Community School District*,[134] the Supreme Court held that a school district could not suspend high school students for wearing armbands in class to protest the Viet Nam war without a showing that such conduct interfered with classroom discipline. The Court recognized that the symbolic protest created some hostility outside the classroom, but declined to uphold the school district's action in the absence of proof that the silent protests actually disrupted the classroom and interfered with the operation of the school.[135] "[I]n our system," wrote Justice Fortas for the majority, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[136] Thus, while the Court recognized an interest in preserving order in the classroom, the school's suspension of the protesting students unconstitutionally impaired their free speech rights because their suspension was ordered without proof that the interest to be protected had been actually harmed or injured.

The Court's reasoning in *Tinker* suggests that mere assertions of injury may not provide a sufficient basis for restricting the vitality of first amendment rights. In defamation actions, allowing a plaintiff the right to force disclosure of confidential sources in an effort to defend his or her reputation may compel disclosure of a source's identity when

est test and the balancing test. In equal protection cases, the Supreme Court has traditionally required that state laws creating suspect classifications, such as race, be subjected to strict scrutiny under a compelling state interest test. Korematsu v. United States, 323 U.S. 214 (1944). In cases involving classifications based on sex, however, the Court has developed an intermediate standard of review, requiring that the classification must "serve important governmental objectives and must be substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976). In disclosure cases before legislative investigative bodies, the Court has required that "the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest." Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 546 (1962). While the standards of *Craig* and *Gibson* are similar, the Court has not articulated an intermediate standard of review for first amendment cases. The adoption of a more stringent balancing test, however, could, as a practical matter, substantially upgrade the protection of constitutional interests. Hence, an inquiry into the underlying interests in source disclosure could be the functional equivalent of some intermediate standard.

134. 393 U.S. 503 (1969).

135. *Id.* at 514.

136. *Id.*

there has been little or no injury to the plaintiff's reputation. Because injury to the plaintiff is the basis of a cause of action for defamation,[137] the absence of evidence of actual injury should create a presumption against judicial orders that may restrict a first amendment interest. Without substantial evidence that the plaintiff suffered actual harm, the underlying purpose of the lawsuit, compensating an injured plaintiff, is illusory.[138] Consequently, in addition to the three-part test of *Garland*, a defamation plaintiff should be required to provide substantial evidence of actual harm as a prerequisite to disclosure of confidential sources.

In defamation actions, however, actual injury has been broadly defined. In *Gertz v. Robert Welch, Inc.*,[139] the Supreme Court restricted the power of juries in private individual libel actions to award damages in excess of the amount necessary to compensate plaintiffs for actual injury absent a finding that the media defendant published with knowing or reckless disregard for the truth.[140] The Court stated, however, that actual injury includes "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."[141] Thus, the definition of actual injury is expansive, encompassing a wide variety of harms that a defamation plaintiff could claim to have suffered.

Because this broad definition may diminish the significance of an actual injury test, careful scrutiny of actual injury evidence should be required, and actual injury should not be presumed at the outset of a discovery process in which first amendment rights may be vulnerable to unnecessary intrusions. Although the Supreme Court's definition of actual injury appears to be reasonable, the evidence produced to demonstrate the quality and magnitude of the injury sustained must be

137. "The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood." Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974).

138. In a different context, the Supreme Court of Florida reversed a reporter's contempt conviction, holding that disclosure of the source, from whom the reporter had obtained the contents of a grand jury presentment, would unnecessarily infringe upon first amendment interests in the absence of proof that publication of the information actually injured an individual. The newspaper story reported the grand jury's criticism of the Dade City Police Chief before he could take action to repress the grand jury report under Florida law, which allowed unindicted persons to file a motion to repress presentments critical of them. Without proof that the Police Chief would have succeeded in repressing the report, the Court concluded that the speculative injury to his reputation was insufficient to justify the disclosure order. "If the mere possibility of injury to private reputation justified a court in requiring that a reporter divulge sources, in what circumstances would a reporter not have to give up the names of confidential informants?" Morgan v. State, 337 So.2d 951, 956 (Sup. Ct. Fla. 1976).

139. 418 U.S. 323 (1974).

140. *Id.* at 348-49.

141. *Id.* at 350.

subjected to close examination to ensure that the harm suffered is neither imagined nor unreasonable. Furthermore, actual injury evidence should be studied with the recognition that public figures are not necessarily injured significantly by the publication of defamatory statements about them. Such individuals generally have greater access to public communication channels, affording them some recourse to deny or explain a statement they consider defamatory.[142]

Substantial Evidence of Success on the Merits

In addition to meeting the *Garland* standards and the actual injury test, a plaintiff should be required to show substantial evidence of success on the merits for those issues that are capable of proof without disclosure of confidential sources. Thus, the public figure plaintiff should provide substantial evidence of publication, falsity, defamatory content, and reference to the plaintiff before disclosure will be considered.[143] Requiring the plaintiff to offer substantial evidence on these elements before compelling disclosure would decrease the likelihood that disclosure would be ordered in cases that would have been rejected for failure to prove another essential element of the case. In addition, a plaintiff whose main objective is source disclosure would find it more difficult to force disclosure by simply filing a defamation action.[144]

In *Gibson v. Florida Legislative Investigation Committee*,[145] the Supreme Court held that procedures of an investigation that threaten first amendment rights must be substantially related to an "overriding and compelling state interest."[146] Thus, the Court found that a legislative committee investigating communist infiltration exceeded its constitutional limitations when it ordered an NAACP official to produce a

142. The Supreme Court made this observation in *Gertz*. *See id.* at 344. This concept was recently reaffirmed in Wolston v. Reader's Digest Association, 443 U.S. 157 (1979). Justice Rehnquist, writing for the majority, noted that public figures "usually enjoy significantly greater access than private individuals to channels of effective communication, which enable them through discussion to counter criticism and expose the falsehood and fallacies of defamatory statements." *Id.* at 164. *See also* Arkin & Granquist, *The Presumption of General Damages in the Law of Constitutional Libel*, 68 COLUM. L. REV. 1482, 1493 (1968). "The small hate publications from both ends of the political spectrum constantly deride political leaders. Attacks against them, defamatory or not, are printed daily in more reputable publications. Amidst this incessant debate, often on a low plane, it is difficult to believe that a public official's reputation is inevitably going to be injured by publication of a libel particularly since a public official has good opportunity for rejoinder."

143. *See* RESTATEMENT (SECOND) OF TORTS § 580A and Comments (1977) (discussion of the elements a plaintiff must prove in a public figure defamation action).

144. See note 9 *supra*. As noted, the Fifth Circuit expanded the three-part test of *Garland* in Miller v. Transamerican Press, 628 F.2d 932, *supplementing* Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir. 1980), by adding a test requiring the plaintiff to show substantial evidence of success on the merits of the case before disclosure can be ordered.

145. 372 U.S. 539 (1962).

146. *Id.* at 546.

list of the organization's Miami membership. Because no relationship was shown to exist between NAACP activities and communist infiltration, the Court concluded that the committee's production order was not substantially related to a compelling state interest and that it constituted an unjustified infringement of the first amendment rights of NAACP members, who might be deterred from free speech and association if they knew they could be identified as NAACP activists.[147]

The existence of a "substantial relationship" between procedures that threaten first amendment rights and a compelling state interest is not easily proven. The *Gibson* Court required that there be "an adequate foundation for inquiry" before forcing disclosures that may inhibit the exercise of first amendment rights.[148] Similarly, there should be an adequate foundation for inquiry before ordering disclosure of news sources in defamation actions, because disclosure of sources may inhibit the exercise of first amendment rights. If a defamation plaintiff cannot present substantial evidence of the basic elements of a defamation cause of action, the foundation for inquiry has not been established. One commentator has suggested that the *Gibson* approach can "prevent or reduce the likelihood of mass fishing expeditions" in congressional investigations.[149] Similarly, the *Gibson* approach could eliminate frivolous defamation claims and avoid an order of disclosure of confidential sources when a prima facie case of defamation cannot be established.[150]

147. *Id.* at 555-57. "[I]t is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest." *Id.* at 546.

148. *Id.* at 557. The *Gibson* Court's primary rationale was that any state policy that threatens to inhibit the type of free communication protected by the first amendment must be justified by a compelling state interest. See note 147 & accompanying text *supra*. Although *Gibson* was decided in the context of legislative investigations, its general principle appears to have a broader applicability. Justice Goldberg's opinion drew significantly from *Bates v. Little Rock*, 361 U.S. 516 (1960), another disclosure case in which a Little Rock, Arkansas ordinance requiring membership disclosure of any organization operating within the city was found unconstitutional. *Bates* discussed state interests in disclosure generally, not solely in the context of a particular type of state investigation. By relying on *Bates* as authority for *Gibson*, Justice Goldberg suggested a general proposition that disclosure orders that threaten first amendment rights must be substantially related to a compelling state interest. In the context of disclosure orders in defamation proceedings, an unsubstantiated defamation claim should not qualify as a compelling state interest that outweighs the important first amendment interest in an uninhibited news flow.

149. *See* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 276 (1970).

150. Reference to the plaintiff may be one area of frequent dispute. In one libel action, for example, disclosure of the source of the information was ordered before reference to the plaintiff could be established. The allegedly libelous report had stated that the son of a high city official had been arrested for smoking marijuana. The Mayor and his son won an order compelling disclosure before the issue of reference was even addressed. Adams v. Associated Press, 46 F.R.D. 439 (S.D. Tex. 1969) *cert. dismissed*, 402 U.S. 901 (1971). The

Conclusion

The conflict between public figure plaintiffs and journalists over the protection of confidential news sources has been addressed in a variety of judicial approaches. Despite the Supreme Court's recent rejection of an editorial privilege in *Herbert v. Lando*, several courts seem to be leaning towards a more constitutionally-sensitive approach to the confidential source problem, an approach that examines the purposes and not merely the mechanics of a balancing test. The adoption of strict standards emphasizing the underlying values in a defamation action can offer a stronger shield for a vigorous press, while allowing an injured plaintiff to recover compensation for defamatory statements. Although the *Garland* standards afford some protection for the first amendment values of the reporter-source relationship in defamation actions, the addition of an actual injury standard and the requirement of substantial evidence of success on the merits of the case could provide more substantive protection for the first amendment interests in nondisclosure. Few tests, however, are immune from judicial manipulation. Thus, the tests or standards employed should ensure that judicial formulas do not casually compromise the basic values that the constitution is designed to promote as well as protect.

*Paul L. Glenchur**

Supreme Court has held that liability for defamation of public officials based on oblique references is unconstitutional. New York Times Co. v. Sullivan, 376 U.S. 254, 288-92 (1964). *See* W. PROSSER, LAW OF TORTS 821 (4th ed. 1971).

* Member, Second Year Class.